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Supreme Court of the United States

OCTOBER TERM, 1966

ILLINOIS CENTRAL RAILROAD COMPANY, *Appellant,*

v.

UNITED STATES OF AMERICA ET AL., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT

The appellant, Illinois Central Railroad Company, appeals from a judgment of the United States District Court for the Northern District of Illinois sustaining orders of the Interstate Commerce Commission.

OPINIONS BELOW

The opinions of the District Court, majority and dissenting (App. 1, pp. 1a-33a), are not yet reported. The report and order of the Interstate Commerce Commission (App. 2, pp. 34a-159a) is reported at 327 I.C.C. 279.[1]

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[1] Because of the length of the District Court's opinions and the Commission's report, particularly the latter, they are printed in a separately bound volume as appendices 1 and 2 to this Statement and the jurisdictional statements of appellants St. Louis Southwestern Railway and Monon Railroad.

JURISDICTION

This action was brought by the appellant in the District Court for the Northern District of Illinois under 28 U.S.C. §§ 1336, 1398, 2284 and 2321-25, and Section 10 of the Administrative Procedure Act, 5 U.S.C. § 1009, to enjoin and set aside orders entered by the Interstate Commerce Commission in its Finance Dockets Nos. 21755, 21892 and 21980.

In accordance with the applicable statute, 28 U.S.C. § 2325, a three-judge court was convened. With one judge dissenting that court entered on August 4, 1966, its judgment affirming the orders of the Commission (App. A, p. 36, *infra*). A notice of appeal was filed by appellant in the District Court for the Northern District of Illinois on September 1, 1966.

Jurisdiction of this Court to hear this appeal is conferred by 28 U.S.C. § 1253. The following cases sustain the jurisdiction of this Court: *A. L. Mechling Barge Lines Inc.* v. *United States,* 368 U.S. 324; *Dixie Carriers Inc.* v. *United States,* 351 U.S. 56; *ICC* v. *Mechling,* 330 U.S. 567; *Skinner & Eddy Corp.* v. *United States,* 249 U.S. 557; *United States* v. *Merchants & Mfrs. Traffic Ass'n,* 242 U.S. 178.

STATUTES INVOLVED

Section 5(2)(a)(i) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(a)(i), provides in pertinent part:

> "It shall be lawful, with the approval and authorization of the Commission, . . . for any carrier . . . to acquire control of another through ownership of its stock or otherwise . . . ."

Section 5(4) of the Interstate Commerce Act, 49 U.S.C. § 5(4), provides:

> "(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any

> transaction within the scope of subdivision (a) of paragraph (2) of this Section, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5) of this section, the words 'control or management' shall be construed to include the power to exercise control or management."

The full text of Section 1(3)(b) and Section 5(2) of the Interstate Commerce Act, 49 U.S.C. §§ 1(3)(b) and 5(2), are set out in Appendix B to this Statement, pages 37-40, *infra*.

QUESTIONS PRESENTED

The Interstate Commerce Commission consolidated for hearing and decision separate applications under Section 5(2) of the Interstate Commerce Act of two railroads, the Missouri Pacific and the appellant, the Illinois Central, for approval and authorization of the acquisition of control of a third railroad, the Chicago & Eastern Illinois. It also consolidated in the same proceeding an investigation instituted by it on its own motion to determine whether one of the applicants, the Missouri Pacific, had already acquired control of the C. & E.I. without Commission approval, in violation of Section 5(4) of the Act. The Commission found that the Missouri Pacific had illegally acquired the power to control the C. & E.I. but concluded that the

violation was mitigated and that in any event it ceased when the Missouri Pacific placed the C. & E.I. securities whose ownership gave it the power of control in a voting trust. It said that it "was not free to summarily deny Missouri Pacific's application" under Section 5(2) because of its violation of Section 5(4). The Commission granted the Missouri Pacific's application and approved and authorized its acquisition of control of the C. & E.I. It denied appellant's application. The court below sustained the Commission's order. The questions presented are:

1. Whether the Commission must consider the merits of a railroad's application for approval and authorization of acquisition of control of another railroad even though the applicant has already acquired control without Commission approval or authorization, in violation of Section 5(4) of the Act, or whether in such circumstances it has the power to deny the application under Section 5(2) of the Act solely on the ground of the antecedent violation.

2. Whether the Commission's conclusion that there were factors mitigating the Missouri Pacific's illegal acquisition of power to control the C. & E.I., notably the subsequent creation of a voting trust of the securities whose purchase gave it such power, and that therefore the law violation was outweighed by purported public interest considerations under Section 5(2) of the Act was correct as a matter of law and rested upon adequate findings, supported by substantial evidence, that provide a rational basis for the conclusion reached.

3. Whether the voting trust established by the Missouri Pacific was irrevocable and thus effectively

insulated the Missouri Pacific from control of and power to control the C. & E.I.

4. Whether the District Court erred in its conclusion that the Commission did not rely upon the assumed irrevocability of the voting trust established by the Missouri Pacific in finding insulation of the Missouri Pacific from control of the C. & E.I. and that therefore it, the court, need not decide the question whether the trust was irrevocable as a matter of law but could sustain the Commission by determining merely that as a practical matter the trust was not revoked and was not likely to have been revoked.

5. Whether the District Court erred in its conclusion that the Commission properly refused to reopen the record to receive evidence concerning (a) the Missouri Pacific's acquisition of additional securities of the C. & E.I., which increased the measure of its control of that railroad, while the proceeding on its application was pending and (b) the significant improvement in the financial and operational health of the C. & E.I., whose debility as depicted in the stale record on which the Commission's decision was based underlay the Commission's conclusion that absorption of the C. & E.I. by another railroad, the Missouri Pacific, would be in the public interest.

STATEMENT

The Chicago & Eastern Illinois Railroad is a bridge and terminal railroad whose lines run south from Chicago to East St. Louis and Thebes, Illinois, on the west and to Evansville, Indiana, on the east. On a map its lines resemble an inverted Y.

The C. & E.I., which in its present corporate form is the product of a bankruptcy reorganization in 1941,

was in financial trouble in the 1950's and the very early 1960's. Its strategic location made it at that time attractive, as a prospect for merger or control, to financially sounder, long-haul roads that wanted access or additional access to the important Chicago gateway.

One such road was the Missouri Pacific Railroad. It does not enter Chicago over its own lines but instead terminates at St. Louis, which is on the C. & E.I. line near the southern end of the west branch of the inverted Y. It had negotiated for a merger with the C. & E.I. from July 1959 until December 1960, and even after its final offer was rejected it did not give up the idea of an ultimate merger. (App. 2, p. 111a). The Louisville & Nashville Railroad also engaged in merger discussions with the C. & E.I. in 1960 and into August 1961. Other roads that were interested were the Chicago & North Western, the New York Central and the St. Louis-San Francisco (Tr., ICC Fin. Dkts. 21755 et al., pp. 2285, 4380).

On August 11, 1961, the Missouri Pacific acquired, without approval or authorization of the Interstate Commerce Commission, certain securities of the C. & E.I. It paid 40 per cent more than the market price for them. (App. 2, pp. 110a-114a). These securities included enough of the C. & E.I.'s Class A Stock to give the Missouri Pacific, as the Commission later found, power to control the C. & E.I. (App. 2, pp. 83a-85a). "Power to exercise control" is by statutory definition the equivalent of the "control" that one rail carrier is specifically forbidden by Section 5(4) of the Interstate Commerce Act to acquire over another without the *prior* authorization and approval of the

Commission.[2] The C. & E.I. thereafter had no further merger discussions with any other railroad.

Having thus acquired statutory "control" of the C. & E.I. illegally, the Missouri Pacific five weeks later applied to the ICC for approval and authorization of its acquisition of control of that carrier.

Subsequently this appellant, the Illinois Central Railroad, which had no ownership interest in the C. & E.I. at the time and has none now, filed an application with the ICC for authorization to acquire control of the C. & E.I.

These two applications were consolidated by the ICC for hearing and decision. Also consolidated was an investigation instituted by the ICC on its own motion to determine whether the Missouri Pacific or the Louisville & Nashville or both had illegally acquired control of the C. & E.I. The L. & N. also had undertaken, soon after the Missouri Pacific's major initial purchase, a program of purchasing C. & E.I. securities with a view to controlling the carrier. (App. 2, p. 82a). It filed an application for approval of such control but withdrew it and participated in the proceeding as an advocate of the position that as a condition of its approval of any acquistion of control of the C. & E.I. the Commission should compel the sale to the L. & N. of the eastern branch of the C. & E.I.'s inverted Y line, terminating at Evansville, Indiana. (App. 2, p. 36a). The L. & N. would thereby obtain a direct entry into Chicago from the points it serves in the Southeast.

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[2] See Interstate Commerce Act §§ 1(3)(b), 5(4), 49 U.S.C. §§ 1(3)(b), 5(4).

The consolidated proceeding went forward expeditiously through the hearing stage. Through much of this stage the Missouri Pacific prosecuted its application as the holder of both legal title to and beneficial interest in the C. & E.I. securities that gave it control of that carrier. In April 1962, eight months after it obtained the securities and not long before the hearing was to conclude, the Missouri Pacific placed its securities in a voting trust of which the Marine Midland Trust Company of New York was trustee. The L. & N. had created a similar trust, with a different trustee, of its C. & E.I. securities at the time it first began purchasing them. (App. 2, pp. 82a-84a).

The hearing examiner recommended that the Missouri Pacific's application be granted and that the Illinois Central's application be denied, and that the condition of approval proposed by the L. & N. should not be imposed. He found also that neither the Missouri Pacific nor the L. & N. had acquired control of the C. & E.I. illegally.

The record on which the examiner's recommendation that the Missouri Pacific be authorized to have control of the C. & E.I. was based was made early in 1962, and the latest data it contained were from 1960 and 1961. The finding of the examiner that it would be in the public interest for the C. & E.I. to be taken over by the Missouri Pacific was based in very large part upon the C. & E.I.'s financial condition, which was precarious in 1960 and 1961. (App. 2, pp. 104a-109a).

After the examiner issued his report and exceptions to it had been filed, the Illinois Central and the Commission's Bureau of Inquiry and Compliance filed petitions to reopen the hearing. In these it was

alleged that the purchases of C. & E.I. securities by the Missouri Pacific and investment banker associates subsequent to the close of the hearing had substantially increased the carrier's holdings and thus enhanced its power to control the C. & E.I. It was alleged, indeed, that if convertible bonds included in the holdings were converted, the holdings would amount to 51 per cent of the C. & E.I.'s voting stock. In addition, the Chicago & North Western Railway, an intervenor in the proceeding, filed a petition to reopen for further hearing, alleging that, on the basis of recent reports, the financial situation of the C. & E.I. had significantly improved. A similar petition was later filed by another carrier, the St. Louis Southwestern Railway.

The Commission issued its report and the order here challenged on February 16, 1965. It agreed with the hearing examiner that acquisition of control of the C. & E.I. by the Missouri Pacific should be authorized and approved as in the public interest and the application of the Illinois Central should be denied. Its judgment that it would be in the public interest for the C. & E.I. to be controlled by another railroad was predicated on the same figures that were before the examiner, which were by this time four and five years old. (App. 2, p. 96a). The Commission took no notice of more recent figures contained in reports of the C. & E.I. filed with the Commission to which the Commission's attention was invited by the Chicago & North Western in its petition to reopen, which had been denied.

The Commission found in favor of the Missouri Pacific and against the Illinois Central on the principal ground that the "end-to-end" affiliation of the C. & E.I. with the Missouri Pacific, giving the latter access to

Chicago for the first time, was preferable to the Illinois Central's proposal whereunder uneconomical duplicative facilities of two somewhat parallel roads would have been eliminated and the C. & E.I. would have been preserved as an independent bridge carrier serving impartially the long-haul carriers in the Chicago area. (App. 2, pp. 42a-50a). In its discussion of the relative merits of the two applications the Commission did not advert to the fact that, as it found in a subsequent portion of its report, the Missouri Pacific had illegally acquired power to control the C. & E.I.

The Commission, differing with the examiner, imposed in its order of approval substantially the condition advocated by the L. & N., requiring good faith negotiations looking toward the sale of the Evansville line to the L. & N.

The Commission also disagreed with the hearing examiner with respect to the unauthorized acquisition of control of the C. & E.I. by the Missouri Pacific. It found that the extent of the Missouri Pacific's interest in the C. & E.I. acquired without Commission approval was such as to give it power to control the C. & E.I., and that the Missouri Pacific therefore had violated Section 5(4) of the Act. (App. 2, pp. 83a-85a). It found, however, factors that in its view mitigated this violation of the law. These included particularly the placement of the securities in a voting trust in April 1962. The trust was found to have effectively insulated the Missouri Pacific from control of the C. & E.I. In substantial part this finding rested upon the Commission's legal conclusion, based solely upon the terms of the trust instrument itself, that the trust was irrevocable during its ten-year term. (App. 2, p. 86a). (Because the L. & N. placed its C. & E.I. securities in

trust as soon as they were acquired, it was found not to have obtained control illegally.)

The Commission said that "even though we find a statutory violation through the unlawful acquisition of control, we are not free to summarily deny Missouri Pacific's application." (App. 2, p. 89a). It concluded that the public interest considerations that it had theretofore recited in its comparison of the applications of the Missouri Pacific and the Illinois Central "overwhelmingly favor approval of the Missouri Pacific's control of [the C. & E.I.] . . . , notwithstanding the Section 5(4) violations" (App. 2, p. 90a). Because of its finding that the voting trust effectively insulated the Missouri Pacific from control of the C.&E.I., it declared that the issues concerning further securities purchases by and on behalf of the Missouri Pacific, raised in the petitions for reopening of the Illinois Central and the Bureau of Inquiry and Compliance, were moot. (App. 2, p. 89a).

On consideration of the complaints of this appellant and others asking that the Commission's order be enjoined and set aside, the District Court sustained the action of the Commission. So far as relevant to the questions raised on this appeal, the court

(1) held that the Commission acted within its discretion in declining to deny the Missouri Pacific's application because of its violation of Section 5(4);

(2) held that it was unnecessary to decide whether as a matter of law the voting trust arrangement created by the Missouri Pacific was irrevocable; that the Commission had not regarded the legal irrevocability of the voting trust as "critical" to its conclusion; and that in any event the voting trust was sufficient, in

the opinion of the court, to insulate the Missouri Pacific from control because of asserted "realities of the railroad business" and without regard to the law of trusts;

(3) held that the Commission could properly deny, on the basis of the existence of the Missouri Pacific's voting trust, the Illinois Central's petition to reopen the record to receive evidence of additional purchases of C. & E.I. securities by the Missouri Pacific and associated brokerage firms, even though the court correctly found that for a substantial period some of such securities were within the dominion of the Missouri Pacific outside of the voting trust, and

(4) held that the Commission was not bound to reopen the record to receive current data as to the financial and operational condition of the C. & E.I. despite the heavy reliance by the Commission upon the distress of the C. & E.I. as depicted by a record that the court acknowledged was "unquestionably stale."

One member of the three-judge court dissented. He would have held that the voting trust was legally revocable, that the Commission acted upon the erroneous legal conclusion that the trust was irrevocable and that the case should be remanded to the Commission for reconsideration in light of a corrected legal construction of the trust. The dissenting judge also disagreed with the majority's holding that the Commission need not consider the Missouri Pacific's further acquisition of C. & E.I. securities and stated that upon the remand the Commission should also be directed to reconsider the financial and operational condition of the C. & E.I. in light of current data.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Consolidation of the railroads of this country, by mergers, acquisitions of control and other devices, is going forward rapidly. The congressional design set forth in the various subsections of Section 5 of the Interstate Commerce Act is to permit such consolidations only where they are authorized and approved in advance by the Interstate Commerce Commission. This design reflects a Congressional determination that the public policy embodied in the statute will best be served if the approval of the Commission is sought *before* and not *after* the transaction forbidden by the statute is consummated. In the present case a railroad by a deliberate violation of the Congressional mandate, and by an artful choice of timing and method of acquisition, was able to obtain, without prior Commission approval, a preemptive position as against other potential purchasers with respect to the control of another railroad. The Interstate Commerce Commission has permitted the railroad to retain and to enjoy the fruits of its unlawful conduct. The case presents substantial issues with respect to whether in so dealing with this situation the Commission properly interpreted its statutory authority and whether its findings and conclusions satisfy applicable legal standards. The resolution of these issues is of the utmost importance to the administration of Section 5 of the Interstate Commerce Act.

I

The Interstate Commerce Commission found that for an eight-month period—during which the Missouri Pacific filed, and presented evidence in support of, an application for approval and authorization of its

acquisition of control of the C. & E.I.—the Missouri Pacific had power to control the C. & E.I. From this fact the Commission concluded, as it had to conclude, that throughout the period the Missouri Pacific was in violation of Section 5(4) of the Interstate Commerce Act.

Nevertheless, the Commission declared that "even though we find a statutory violation through the unlawful acquisition of control, we are not free to summarily deny Missouri Pacific's application" under Section 5(2) of the Act for approval of its acquisition of control of the C. & E.I. (App. 2, p. 89a).

In thus holding itself powerless to deny at the threshold the application of a law violator that in substance seeks Commission ratification of action illegally taken, rather than advance approval of action to be taken, the Commission ruled in a manner contrary to this Court's decision in *Gilbertville Trucking Co.* v. *United States,* 371 U.S. 115. Like this case, the *Gilbertville* case involved the interplay of Sections 5(2) and 5(4) of the Act. The Commission there had found a violation of Section 5(4) and on that basis denied an application under Section 5(2). This action was objected to by the applicants on the ground that, on the facts of the case, the Commission must have been applying a rule that made a Section 5(4) violation an automatic bar to approval of a Section 5(2) application and such a rule was not legal. This Court held that the applicants were wrong in their characterization of the Commission's action as imposing an automatic bar, but at the same time it made clear that under the governing statutory provisions the Commission was free to impose such a bar. The Court held that "an automatic rule is not neces-

sarily arbitrary." Indeed, the Court spoke approvingly of a rule of automatic disqualification of a Section 5(4) violator, saying that "to approve a merger in the face of a § 5(4) violation may encourage others whose merger may or may not be consistent with the public interest to either present the Commission with a fait accompli or avoid its jurisdiction altogether." The Court quoted from the Commission's own opinion in *Central of Georgia Ry. Control,* 307 I.C.C. 39, 44 (1958), where the Commission said that, if the practice of presenting it with a *fait accompli* were encouraged, "'our administration of the statute in the public interest would be seriously hindered, if not defeated.'" 371 U.S. at 128.

Commission control of carrier unifications was introduced into the Interstate Commerce Act by the Transportation Act of 1920.[3] Those provisions, the forerunners of what is now Section 5(2), were not wholly effective to prevent unauthorized consolidations, and it was for precisely this reason that Section 5(4) was added to the Interstate Commerce Act by the Emergency Railroad Transportation Act of 1933.[4] See *Gilbertville Trucking Co.* v. *United States, supra,* at 122-25.

It is clear that, under these complementary provisions, the Commission does have power to deny a Section 5(2) application on account of an applicant's violation of Section 5(4). The Commission itself has recognized that the intent of these provisions is to

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[3] Transportation Act of 1920, § 407, 41 Stat. 480, adding §§ 5(2)-(8) to the Interstate Commerce Act.

[4] Emergency Railroad Transportation Act of 1933, §§ 201-02, 48 Stat. 217.

assure achievement of the congressional purpose that the Commission "pass upon 'proposed' acquisitions of control prior to their consummation, including the justness and reasonableness of the terms upon which such control is to be acquired," *Central of Georgia Ry. Control, supra,* at p. 44. It is not consistent with this purpose to read the statute as withholding from the Commission the authority to determine that a deliberate violation of Section 5(4) is in itself sufficient reason for the denial of an application under Section 5(2).

The Commission's contrary position as taken in this case is in flat conflict with the reading of its organic statute by the other principal federal regulatory agency that administers a statute under which carrier unifications can be authorized and thereby immunized from the antitrust laws.

Section 408 of the Federal Aviation Act, 49 U.S.C. § 1378, and of its predecessor the Civil Aeronautics Act, derives from Section 5 of the Interstate Commerce Act.[5] It provides that "it shall be unlawful" without the approval of the Civil Aeronautics Board for air carriers to enter into substantially the same unification transactions that are forbidden by Section 5(4) of the Interstate Commerce Act to carriers under ICC jurisdiction. Some years ago the CAB laid down the general rule (with an exception only for "exceptional circumstances") that whenever it had reason to believe that an applicant for approval under Section 408 had, at the time of his application, violated the section by having acted without prior Board approval "the application will be held in abeyance

[5] See Acquisition of Marquette by TWA, 2 C.A.B. 409, 412 (1940).

until either the alleged violation has been voluntarily terminated or the completion of a proceeding to determine the existence of the violation and, in the event a violation is found to exist, until the violator has taken required corrective action." *Sherman, Interlocking Relationships and Stock Ownership,* 15 C.A.B. 876, 881 (1952). (The CAB has held that the voluntary creation of a voting trust does not satisfy these requirements. See pp. 22-23, *infra.*) The Board declared that "this mode of processing [is] an appropriate one under" its statute. The President of the United States, who has final authority over air carrier unifications that involve the transfer of certificates authorizing the operation of foreign routes, has taken the same view as the Board.[6] In a case in which an applicant carrier had illegally acquired control of another, the Board submitted to the President an order approving the acquisition by the controlling carrier of the assets of the other, on the ground of "important public interest factors," including a reduction in government subsidy. The President determined that the acquisition should be disapproved because of the prior violation of Section 408. The Board quoted him as believing that air carrier "mergers should be accomplished in full accordance with the requirements of the Civil Aeronautics Act, including the requirement of advance approval of any acquisition of control." *Eastern-Colonial, Acquisition of Assets,* 18 C.A.B. 453, 455-56 (1954).

In sustaining the Commission's order, the court below said merely that the Commission need not debar

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[6] The President's authority is conferred by Federal Aviation Act § 801, 49 U.S.C. § 1461.

a Section 5(2) applicant because of a Section 5(4) violation. This is not responsive to the point made here and below that the Commission was wrong as a matter of law in disclaiming the power to disqualify an application without consideration of the nature of the violation or of the benefits asserted to flow from the transaction of which approval is sought. This Court should make clear to the Commission that it has the disclaimed power. If it were made clear to the Commission that it possessed this power, it would then be in a position to determine whether to adopt a simple prophylactic rule of disqualification of law violators, which would in turn avoid the kind of difficulties that confronted both the Commission and the reviewing court in this case.

II

Having decided that it had no authority to deny the application of the Missouri Pacific solely on the grounds of its prior violation of Section 5(4), the Commission then concluded that the violation was not "flagrant" but was mitigated by factors that justified the Commission in determining that public interest considerations required the approval of the application. We submit that there is no rational support in substantial evidence or in the Commission's subsidiary findings or in law for the conclusion that there were factors mitigating the violation that justified the Commission in approving the application.

It is perfectly clear on the record that the Missouri Pacific's violation of Section 5(4) was willful and flagrant in every sense in which those terms are meaningful. No more is needed to demonstrate this than the hearing examiner's findings adopted by the Commission. The Missouri Pacific had negotiated with the C. & E.I. concerning a merger for a year and

a half beginning in July 1959. It did not give up the idea of such a merger even after its final offer was rejected in December 1960. It purchased the block of securities that gave it power to control the C. & E.I. on August 11, 1961, paying a premium. The purchase clearly was no mere investment. Three days after it was made, the president of the C. & E.I. was advised that the Missouri Pacific was going to file an application for approval of its acquisition of control. (App. 2, pp. 111a-112a). The Missouri Pacific was well aware that one railroad cannot control another without Commission approval and authorization, and it was as well able as the Commission to calculate the power over the C. & E.I, that the securities included in the August purchase gave it. This was no instance of good faith action based on mistaken understanding of the facts or the applicable law, bad advice or innocent motives. It was action altogether comparable to that of another railroad which the Commission, shortly before the Missouri Pacific acted, had condemned in *Central of Georgia Ry. Control,* 307 I.C.C. 39 (1958).

At the very least the illegal acquisition had the intended effect of chilling other carriers' interest in the C. & E.I. and thus preventing the working out, for the Commission's consideration, of what might have been a more rational and desirable consolidation. It thereby thwarted fulfillment of Congress' clear purpose in enacting Section 5 and adding to its provisions over the years.

Aside from the creation of the voting trust, which is discussed below, all that the Commission said that there was in the way of mitigation of the Missouri Pacific's violation is that, having applied belatedly for Commission approval and thus being placed on its

good behavior, the Missouri Pacific forbore during the period of its outright ownership of the C. & E.I. securities to exercise to the full the power of control that it enjoyed. This is not surprising and scarcely relevant. For the fact remains that the power achieved by the Missouri Pacific by its purchase of C. & E.I. securities on August 11, 1961, was amply sufficient for its purpose. This was to put itself in a position to veto any other possible merger, sale or lease of the C. & E.I. properties, so that both the management of the C. & E.I. and the managements of other railroads would know that merger negotiations or even studies would be fruitless.

This situation continued even after the voting trust was created. By the C. & E.I.'s charter the assent of two-thirds of the Class A stock outstanding is necessary for approval of certain transactions, including consolidations and mergers, leases and sales. The Commission found, in view of the historic failure of 10 per cent or more of the Class A stock to be voted, that the not quite one-third of the Class A stock held by the Missouri Pacific was enough "to block stockholder assent to, and thereby prevent [the C. & E.I.] from accomplishing various corporate transactions, such as mergers, leases and sales." (App. 2, p. 84a). Stock in that amount was in the trust. The trust agreement provided that the trustee "shall not vote or assent in respect of any such securities for the acquisition of control" of the C. & E.I. by the Missouri Pacific or any other company "except as may be permitted or authorized by the Interstate Commerce Commission or required by a court of competent jurisdiction."

As a practical matter this direction not to vote on an "acquisition of control of the C. & E.I.," taken together with other circumstances, served to maintain the Missouri Pacific's veto. This fact was not altered by the clause of the voting trust permitting the trustees to vote on a control transaction with the authorization of the Interstate Commerce Commission or by direction of the court. Whatever meaning is to be given to that qualification the fact remains that one-third of the Class A stock of the C. & E.I. was in substantial measure sterilized by the voting trust and this necessarily severely limited the freedom of the C. & E.I. to negotiate with other interests on matters relating to control and as a practical matter effectively discouraged other persons from attempting to negotiate lawful arrangements with the C. & E.I. looking toward the acquisition of control.[7]

The Commission did not consider or appraise the preemptive effect of the Missouri Pacific's unlawful acquisition of control in determining the character of the violation. The Commission appears to have regarded the creation of the voluntary voting trust as of primary if not decisive importance in mitigating the offense without giving any consideration to whether the voting trust effectively did or could terminate this effect of the unlawful acquisition. Nothing in its findings or conclusions provides a rational explanation for the Commission's failure to give weight to this aspect of the unlawful acquisition.

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[7] It might also mean that the trustee could vote in case it was authorized or permitted to do so by the ICC or required to do so by a court, but we do not understand in what circumstances either of those things would happen.

The action of the Commission in giving overriding importance to the voluntary creation of the voting trust should be contrasted with the position that the Civil Aeronautics Board has taken in its administration of a statutory provision that is similar to Section 5 of the Interstate Commerce Act. The Civil Aeronautics Board has wisely declined to embark upon the pointless exercise of grading and classifying degrees of culpability. In adopting its rule that a transaction by which Section 408 of the Federal Aviation Act has been violated must be undone before an application under Section 408 will be considered, the Board stated that this rule "will exclude any consideration . . . of circumstances in mitigation of violations." *Sherman, Interlocking Relationships and Stock Ownership,* 15 C.A.B. 876, 881 (1952).

Moreover, the Board has lately refined this doctrine in the specific area of voting trusts. Over the years the Board had directed or approved the creation of severely restrictive voting trusts, to be liquidated in a specified period, as a means of redressing pre-existing violations of Section 408.[8] Persons subject to the Board's jurisdiction erroneously inferred from these decisions that the Board would regard the same kind of restrictive voting trusts as an insulation from control in the first instance, so that an application for approval of an acquisition of control would be considered if only the securities by which control had already been acquired were held in a voting trust. In 1964, when such a case was presented to it, the Board said "that in the future it will not view the creation of a voting trust as an excuse for failing to seek Board

[8] See, *e.g.*, Hughes-TWA-Atlas-Northeast, Common Control, 27 C.A.B. 155 (1958).

action on relationships otherwise subject to Section 408 . . . in advance of the establishment of the relationship or as a ground for waiver of the *Sherman Doctrine.*" *National-Maytag,* CAB Order No. E-20701, April 15, 1964, p. 2. See also *West Coast Air Lines, Inc., Enforcement Case,* CAB Order No. E-22448, June 1, 1965.

The District Court in its opinion was unable to provide any rational explanation for the Commission's conclusion that the violation here involved was not sufficiently flagrant or serious to give it any significant weight in relation to the assumed public interest advantages of granting the Missouri Pacific application. The court began by contrasting the case of a flagrant violation of Section 5(4) "in open defiance of Commission authority" with a case in which the applicant acted in good faith but committed a technical violation. The court did not, however, suggest that the actions of the Missouri Pacific fell in the latter category. The court then observed that in the case of a flagrant violation "the public interest may require denial of a Section 5(2) application" while in the case of a good faith but technical violation "the public interest in strict enforcement of Section 5(4) may be comparatively small". (App. 1, pp. 6a-7a). Then in apparent response to the argument that the Missouri Pacific violation was flagrant the court said that "a mere similarity in the degree of flagrancy of violation between cases does not dispose of the problem since the public benefits of control may be greater in one case than in another." (*Ibid*). The court said that the Commission "applies a balancing test". (App. 1, p. 6a). The court was unable, however, to indicate even in general terms the legal standards that should apply in determining whether the balance in a particular case

has a rational foundation and was, therefore, in no position to determine whether the Commission in this case had applied a proper standard. In short, the court suggested no legal restrictions on what the Commission may do in blessing violations of Section 5(4) but appeared to leave that crucial question entirely to uncontrolled administrative discretion.

III

The Commission made findings as to the terms of the Missouri Pacific's trust that govern the exercise by the trustee of the stock's voting privileges. It found explicitly that "the trust, during its term, is irrevocable, and is to remain effective until the occurrence" of certain events specified in the trust instrument. (App. 2, p. 86a). It concluded, on the basis of these terms, that the trust was adequate to divest the Missouri Pacific of power to control or manage the C. & E.I. in a common interest with the Missouri Pacific. Therefore, it concluded ultimately that the Missouri Pacific's violation "ceased upon effectuation of the trust . . . ." (App. 2, p. 89a).

The Commission did not look beyond the terms of the trust except to say that there was no evidence that the trustee had acted inconsistently with them; by carrying out the terms of the instrument, the Commission said, the trustee had successfully insulated the Missouri Pacific from power to control the C. & E.I. (App. 2, p. 89a).

Plainly irrevocability of the trust was essential to the Commission's ultimate conclusion since a trust that could be revoked by the Missouri Pacific at any time would afford no insulation at all. By the terms of the instrument the trust purported to be irrevocable during its ten-year term, and the Commission's inquiry

stopped there. It could not properly do so for as a matter of law the trust was revocable by the Missouri Pacific.

The general rule is that where a settlor is the sole beneficiary of a trust he may terminate the trust at any time. That is the rule of Section 339 of the Restatement of Trusts.[9] And Comment *a* to that section states that the rule applies "even though it is provided in specific words by the terms of the trust that the trust shall be irrevocable."

Moreover, matters concerning the administration of a trust, which include the question of its irrevocability, are governed by the law of the state where the trust corpus is held and administered.[10] In this case that state is New York, the situs of the trustee, the place where the securities were deposited with the trustee and the place where the trustee administers the trust. Section 23 of the New York Personal Property Law provides that with the written consent of all persons beneficially interested in a trust in personal property the creator of such a trust may revoke it. This statute governs even where the trust instrument specifies that the trust is irrevocable. *Pulsifer* v. *Monges,* 66 N.Y.S. 2d 367, 368 (Sup. Ct., 1946). Here, of course, the creator, the Missouri Pacific, is the only person beneficially interested, and therefore, it may unilaterally revoke the trust.

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[9] "Where Settlor is Sole Beneficiary—If the settlor is the sole beneficiary of a trust and is not under an incapacity, he can compel the termination of the trust, although the purposes of the trust have not been accomplished."

[10] Warner v. Florida Bank & Trust Co., 160 F.2d 766, 772 (5th Cir. 1947); Noble v. Rogan, 49 F. Supp. 370, 371 (S.D. Cal. 1943); Restatement, Conflict of Laws, § 297 (1934).

IV

The court below did not decide the question of elementary trust law just discussed, even though it was invited by the Commission to do so. The Commission recognized that the ultimate question whether a voting trust is effective to insulate a carrier from control of another is a question of law for courts to decide, and not a question within its special competence. The Commission said that a carrier that creates a trust without its prior approval proceeds on the chance "that, if put to the test of judicial scrutiny, the trust will be upheld" as having achieved the desired objective. (App. 2, p. 87a). The voting trust in this case was not subjected by the District Court to the kind of judicial scrutiny that the Commission envisaged.

In leaving unanswered the question of the legal revocability of the trust, the court supplied the Commission with a rationale for its decision, grounded in supposed "realities of the railroad business," that the Commission, which invited a judicial determination of the effectiveness of the trust, did not provide for itself. Under familiar principles this was beyond the court's power. *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 168-69; *SEC* v. *Chenery Corp.,* 318 U.S. 80.

The court proceeded on its erroneous way from a misreading of the Commission's report. It stated that the passage of the report in which the Commission declared that "the trust . . . is irrevocable" "was a passage of description, not judgment" and said that the report "contains no indication that *legal* irrevocability of the 'independent voting trust' was critical to the conclusion that the trust was effective for pur-

poses of § 5(4)." (App. 1, pp. 9a, n. 5, 12a). These statements are not accurate descriptions of the Commission's report. (See pp. 10-11, 24, *supra*).

With its erroneous view of the nature of the Commission's decision, the court set forth the authorities sustaining the rule that a settlor who is a sole beneficiary may revoke a trust at will, and it recited the contrary argument made below. This is that the undoubted rule as to a settlor-sole beneficiary trust is not applicable to a commercial trust designed to achieve a particular business purpose, especially where other persons have an interest in having the purpose fulfilled.[11] The court did not rule either that there is

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[11] Only one case has been seriously cited for this supposed exception to the rule of revocability of a trust whose settlor and beneficiary are the same person. That is Hearst v. American Newspapers, Inc., 51 F. Supp. 171 (D. Del. 1943). In that case, arising under Delaware law, a voting trust had been created, stated to be irrevocable for a specified period. In reliance upon the trust loans were made and the loan agreements recited and confirmed the terms of the trust, including its irrevocability. The court allowed the trustee to assert the interest of the lenders arising from their agreements and on that basis to decline to return the securities to the settlor-beneficiary of the trust. The case is wholly inapposite. A Delaware case in which the facts are comparable to those here and which revocation at the instance of a settlor-beneficiary was permitted is H. M. Byllesby & Co. v. Doriot, 25 Del. Ch. 46, 12 A.2d 603 (Del. 1960).

The interested person in this case, analogized to the lenders in the *Hearst* case, is said to be the Interstate Commerce Commission, which has an interest in enforcing § 5(4) of the Act. The Commission has never asserted that this interest gives it the power to defeat an attempted revocation of this or any other voting trust. The draftsmen of the trust could readily have made the ICC a party to it, whose consent to revocation would have been necessary. They did not, although the form of voting trust approved by the Civil Aeronautics Board, in which its approval of termination is explicitly required, was available to them. See Hughes-TWA-Atlas-Northeast, Common Control, 27 C.A.B. 155, 158 (1958).

such an exception or that, if there is, this case is within it. (App. 1, pp. 10a-11a).

The court then said that the Missouri Pacific, having represented to the Commission that its voting trust was irrevocable, might be estopped to assert its revocability. But it did not decide the point. It went on to say that "this debate on revocability of trusts has little to do with this case" and that the question whether the trust insulated Missouri Pacific from control of the C. & E.I. is "addressed more to the realities of the railroad business than the niceties of trust law." The court then quoted from conclusory passages of the Commission's report that rested upon its prior determinations concerning the trust, including its irrevocability, and purported to find in them a judgment of effectiveness of the trust based upon "the realities of the railroad business." (App. 1, pp. 10a-11a). We submit that the Commission was making no such judgment, and we invite the Court's reading of the relevant pages of its report. (App. 2, pp. 85a-87a).

Finally, for good measure the court added reasons of its own for finding the trust an effective insulation device regardless of its revocability. These, as the court's dissenting member said, boiled down to assertions that "the power of the Commission to redress illegal control situations 'is practically plenary' " and that "Missouri Pacific is not likely to eliminate or revoke the trust." The dissenter aptly pointed out that the inapplicability of those two contentions "is apparent" for "the issue is not whether Missouri Pacific would take advantage of a position it gained by reason of its § 5(4) violation or what the Commission could do in the face of Missouri Pacific's exercise of control." (App. 1, p. 30a).

Appellant and the other parties to the proceeding before the Commission and the court below are entitled to the judgment of a court, invited by the Commission, as to the correctness of a necessary premise of the Commission's decision that the Missouri Pacific's violation of Section 5(4) ceased when it placed its C. & E.I. securities in the hands of a trustee. The premise is that the trust was irrevocable; only if that is so did the Missouri Pacific give up dominion over securities that carried with them the power to control the C. & E.I. This Court alone can see to it that the judicial judgment is given.

V

A. The Missouri Pacific continued to acquire securities of the C. & E.I. after its creation of the voting trust in April 1962 and while the Commission's investigation into whether it had unlawfully acquired control of the C. & E.I. continued. Pursuant to arrangements with long-time investment banking associates the Missouri Pacific on February 20, 1964, acquired $4,878,000 of convertible C. & E.I. bonds. It placed them in the voting trust. The associates themselves held 59,900 shares of C. & E.I.'s common stock, which the Missouri Pacific did not purchase outright.

It is a mathematical fact that, if the bonds were converted and if the associated bankers' holdings of common stock are attributed to the Missouri Pacific, the Missouri Pacific would have more than 50 per cent of the C. & E.I.'s stock.

These facts, which were undisputed, were brought to the attention of the Commission by petitions filed by the Illinois Central and the Commission's Bureau

of Inquiry and Compliance, in which the Commission was asked to reopen the record so that it could receive and have for its consideration evidence of this acquisition by the Missouri Pacific of further control of the C. & E.I.

The Commission denied the petitions. After having found that the voting trust created by the Missouri Pacific was irrevocable and thereby insulated the Missouri Pacific from control of the C. & E.I., it said merely that these findings "render moot the issues raised in the petitions filed by Illinois Central and the Bureau . . ." (App. 2, p. 89a).

If, as we have urged above, the Commission's determination that the trust was irrevocable is wrong as a matter of law, then of course upon a return of the case to the Commission it is bound to consider the additional acquisition of C. & E.I. securities by the Missouri Pacific on a correct understanding of the law. But even if it is assumed that the trust was irrevocable its existence did not immunize the Missouri Pacific from the further control represented by the convertible bonds. If converted, the bonds alone represent 32 per cent of the C. & E.I.'s common stock.

This was made clear by the District Court, which, unlike the Commission, read closely and analyzed the undenied allegations of the petitions to reopen and documents appended to them. Its analysis revealed that the bonds were purchased (a) pursuant to an agreement whereby the Missouri Pacific was obligated to one of its associates to take bonds purchased by the associate for the Missouri Pacific unless in its opinion it was legally unauthorized to do so and (b) pursuant to an agreement with the other associate whereby the

bonds would be held by the associate until the Missouri Pacific had final and effective authority from the ICC to control the C. & E.I.

The District Court found that the Missouri Pacific's own legal opinion as to its authority to purchase the bonds was no sufficient insulation and that it had acted in disregard of the condition purporting to prevent its purchase of the bonds until its control of the C. & E.I. had been approved; "it appears that the agreement's shield between [the Missouri Pacific] and the bonds was a mere gossamer with no binding effect . . . ." (App. 1, pp. 20a-21a). Therefore, the court held, for the period in which the options were effective, the period before it had purchased the bonds and turned them over to its trustee, the Missouri Pacific must be charged with the power to control the C. & E.I. that inhered in the bonds. Inexplicably, however, the court did not hold that the Commission, whose sole reason for denying the petitions to reopen as moot was the existence and effectiveness of the voting trust, had erred in denying those petitions and refusing to consider the massive acquisition of further control by the Missouri Pacific. It ascribed to the Commission reasons for denying the petitions that the Commission did not state. It assumed that, since all the facts were before the Commission, including "the conditions under which [the Missouri Pacific] had access to the power to acquire 32 per cent of the C. & E.I.'s stock," it had considered them and that it had not "clearly abused its discretion in finding no sufficient new § 5(4) violation raised by the facts stated in the petitions." (App. 1, p. 21a).

It may be that the Commission has some discretion in the premises, but, contrary to the District Court's

holding, there is no indication in the Commission's report that any such discretion was exercised. Once the court had laid bare the legal error of the Commission in believing that the existence of the trust was a complete answer to the petitions to reopen, the court was bound to set aside the Commission's action and not speculate as to reasons the Commission might have given but did not give for denying the petitions. *Cf. Sunray Mid-Continent Oil Co.* v. *FPC,* 353 U.S. 944. Apprised of its legal error, the Commission, we believe, would have no choice but to reopen the record and receive and consider evidence of the Missouri Pacific's continuing blatant violation of Section 5(4). The Commission's belief that the Missouri Pacific's conduct was comparatively innocent was critical to its decision that the Missouri Pacific was entitled to the benefit of the chain of events it set in train in 1961 with its illegal purchase of C. & E.I. securities. That the Missouri Pacific was capable of the further dubious, if not illegal, acts found by the District Court must affect the Commission's judgment.

B. On the basis of data covering a period no later than 1961 the Commission believed that the C. & E.I. was in desperate straits and therefore its absorption by another, stronger railroad was in the public interest. (App. 2, p. 91a).

In fact, the picture of the C. & E.I.'s situation that emerges from a record made in 1962 is a false picture. Both operationally and financially the C. & E.I.'s situation has improved dramatically since that time. By 1965 the C. & E.I.'s traffic volume had increased by 19 per cent over 1961 and its freight revenues by 24 per cent. It showed a loss in 1960 and barely more than a break-even in 1961; it had net income of

$1,736,000 in 1965. Physically, great improvements were made in the C. & E.I. facilities. The carrier's common stock increased in value by 200 per cent, and in 1965 it issued new common stock, the first issue of equity securities by any railroad since the depression.

The Commission, in denying reiterated requests to reopen the record so that it could have the benefit of these current data, blinded itself to the facts concerning the great improvement in the C. & E.I.'s condition and thereby chose to decide the case on the basis of unrealities.

On this point the court below held that the denial of a petition to reopen is within the Commission's discretion and, in substance, that this discretion cannot be abused. (App. 1, p. 24a).

No decision of this Court goes so far. There is no doubt that the Court has been properly skeptical of parties' complaints that the records in protracted administrative proceedings are stale and should be brought up to date. See *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 534-35; *ICC* v. *Jersey City*, 322 U.S. 503, 514-16; *United States* v. *Northern Pac. Ry.*, 288 U.S. 490. But none of its decisions subsequent to *Atchison, T. & S.F. Ry.* v. *United States*, 284 U.S. 248, impairs the holding of that case that, where the facts underlying an agency's order have changed completely, the agency issuing the order must take steps, by reopening if need be, to apprise itself of the current situation. In that case the drastic change was in the revenue and expense situation of a group of carriers between the time of the making of a record on which maximum rates were prescribed and the time the rate order became effective; the order

was no longer responsive to realities. No more is the order here responsive to realities insofar as it permits a small carrier to be absorbed by a larger one because the small carrier is weak and ill—when in fact the small carrier has become healthy and begun to thrive.

The court that probably reviews more federal administrative actions than any other, the Court of Appeals for the District of Columbia Circuit, has held an agency bound to reopen a record when it was presented in a petition for rehearing with facts showing that a basic premise of a decision, like the debility of the C. & E.I. in this case, was no longer in accord with the facts. *Great Lakes Airlines* v. *CAB,* 294 F.2d 217, 227 (D.C. Cir. 1961), *cert. denied,* 366 U.S. 965; *Braniff Airways Inc.* v. *CAB,* 147 F.2d 152, 153 (D.C. Cir. 1945). That court, acutely sensitive to the practicalities and needs of the administrative process and fully aware of this Court's decisions qualifying the *Santa Fe* case, nevertheless has held in the cases cited that there are circumstances in which the showing of a change in facts critical to the agency's decision is so compelling that the agency, even at the risk of further delay, must enlighten itself. The decision below conflicts with those decisions of the Court of Appeals as well as with the *Santa Fe* case.

CONCLUSION

Probable jurisdiction should be noted and the case set for plenary consideration on the merits.

Respectfully submitted,

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October 1966

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 65 C 1393

ILLINOIS CENTRAL RAILROAD COMPANY, MONON RAILROAD and ST. LOUIS SOUTHWESTERN RY.,
Plaintiff and Intervening Plaintiffs,

- VS -

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, MISSOURI PACIFIC RAILROAD COMPANY, CHICAGO & EASTERN ILLINOIS RAILROAD, LOUISVILLE AND NASHVILLE RAILROAD COMPANY and LEON LEIGHTON,
Defendants and Intervening Defendants.

Decree

This cause having come on for trial before the Court, consisting of three judges convened pursuant to law, and the Court having reviewed the evidence and having considered the briefs and arguments of counsel for the parties, and having rendered and filed its opinion herein, and being fully advised in the premises,

IT IS ORDERED, ADJUDGED and DECREED that the order of the Interstate Commerce Commission entered in Finance Docket Nos. 21755, 21892, and 21980 on February 16, 1964, be, and it is hereby, affirmed.

ENTER:

ELMER J. SCHNACKENBERG
Circuit Judge

BERNARD M. DECKER
District Judge

DATED: August 4, 1966.

APPENDIX B

Section 1(3)(b) of the Interstate Commerce Act, 49 U.S.C. § 1(3)(b), provides:

(b) For the purposes of sections 5, 12 (1), 20, 304 (a) (7), 310, 320, 904 (b), 910, and 913 of this title, where reference is made to control (in referring to a relationship between any person or persons and another person or persons), such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies or through or by any other direct or indirect means; and to include the power to exercise control.

Section 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2), provides:

(2) Unifications, mergers, and acquisitions of control.

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more

carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305 (e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the trans-

action proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected.

In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or cariers by railroad and the duly authorized representative or representatives of its or their employees.

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